A

TAN YING HONG

v.

TAN SIAN SAN & ORS

B

COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
ZAINUN ALI JCA
AHMAD MAAROP JCA
[CIVIL APPEAL NO: C-02-800-03]
C 19 FEBRUARY 2009

LAND LAW: *Indefeasibility of title and interests - Charge - Whether bank's interest as chargee of land registered to appellant indefeasible despite appellant's title being defeasible - Principles applicable - National*
D *Land Code, s. 340(1), (2), (3)*

LAND LAW: *Charge - Indefeasibility of interest - Whether bank's interest as chargee of land registered to appellant indefeasible despite appellant's title being defeasible - Principles applicable - National Land*
E *Code, s. 340(1), (2), (3)*

BANKING: *Securities for advances - Charge - Indefeasibility of interest - Whether bank's interest as chargee of land registered to appellant indefeasible despite appellant's title being defeasible - Principles applicable - National Land Code, s. 340(1), (2), (3)*

F

In this dispute pertaining to certain land registered to the appellant and charged by the first respondent to the third respondent as security for banking facilities granted to the second respondent, the trial judge made the following findings: (i) the registration of
G the appellant in the issued documents of title was obtained by fraud or forgery; (ii) the appellant had never charged the land to the third respondent; (iii) the appellant had never granted a Power of Attorney to the first respondent; and (iv) the appellant had never given authority to the first respondent to charge the land
H to the third respondent. The trial judge went on to say that in view of these findings s. 340(2) of the National Land Code ('NLC') applied, rendering the appellant's title defeasible, and that the appellant did not come within the category of persons entitled under s. 340(3)(a) and (b) of the NLC to seek an order to nullify
I the relevant charges. He was also of the view that to conclude that the charges were void would prejudice the third respondent's rights as holders of the charges. Hence, the present appeal, in

which the appellant's primary purpose was to invalidate the charges, pursuant to the third respondent's demand for the repayments of the overdraft and loan facilities that had not been settled by the second respondent.

Held (dismissing the appeal with costs)
Per Zainun Ali JCA delivering the judgment of the court:

(1) The third respondent's title in the charges was indefeasible. The third respondent was an innocent party and, thus, its interest as chargee was indefeasible unless there was evidence of its knowledge that there was fraud or misrepresentation or where the registration of the charges was obtained by forgery or where the title or interest was unlawfully acquired. There was, on the facts, clearly no such evidence. The interest of the chargee, being indefeasible, was protected by the proviso under s. 340(3) of the NLC, and although the appellant's title was defeasible under s. 340(1) of the NLC its registration was not and had not been invalidated to date. The appellant, although registered as the owner of the land, did not actually own the land. However, the interest of the land was subsequently granted to the third respondent as chargee, who was *bona fide* and who acquired the interest in good faith with consideration. Applying the principle in *Adorna Properties Sdn Bhd v. Boonsom Booyanit*, the third respondent obtained immediate indefeasibility of its interest. Thus, the third respondent did not acquire its interest under an instrument that was void. In fact, the third respondent had acquired its interest, to all intents and purposes, as an interest subsequently granted from the appellant (being the registered owner) and in good faith and for valuable consideration. In view of the above, the appeal ought to be dismissed. (paras 33, 34, 35, 36, 37, 38 & 39)

Bahasa Malaysia *Translation Of Headnotes*

Dalam pertikaian ini mengenai tanah tertentu yang didaftarkan kepada perayu dan digadaikan oleh responden pertama kepada responden ketiga sebagai cagaran untuk kemudahan perbankan yang diberi kepada responden kedua, hakim perbicaraan membuat dapatan-dapatan yang berikut: (i) pendaftaran perayu dalam dokumen-dokumen hakmilik yang dikeluarkan telah diperolehi melalui fraud atau pemalsuan; (ii) perayu tidak pernah mengadaikan tanah itu kepada responden ketiga; (iii) perayu tidak pernah

memberi Surat Kuasa Wakil kepada responden pertama; dan (iv) perayu tidak pernah memberi kuasa kepada responden pertama untuk mengadaikan tanah itu kepada responden ketiga. Hakim perbicaraan terus berkata bahawa memandangkan dapatan-dapatan ini s. 340(2) Kanun Tanah Negara ('KTN') terpakai, membuatkan hakmilik perayu boleh disangkal, dan bahawa perayu tidak terangkum dalam kategori orang yang berhak di bawah s. 340(3)(a) dan (b) KTN untuk menuntut suatu perintah yang dapat membatalkan gadaian-gadaian yang relevan. Beliau juga berpendapat bahawa untuk membuat kesimpulan bahawa gadaian-gadaian itu tak sah akan memprejudiskan hak-hak responden ketiga sebagai pemegang gadaian-gadaian itu. Oleh yang demikian, rayuan semasa, di mana tujuan utama perayu ialah untuk mentaksahkan gadaian-gadaian itu, mengikut tuntutan responden ketiga untuk pembayaran balik overdraf dan kemudahan pinjaman yang tidak diselesaikan oleh responden kedua.

Diputuskan (menolak rayuan dengan kos)
Oleh Zainun Ali HMR menyampaikan penghakiman mahkamah:

(1) Hakmilik responden ketiga dalam gadaian-gadaian itu tidak boleh disangkal. Responden ketiga merupakan pihak yang tak bersalah dan, oleh itu, kepentingannya sebagai pemegang gadaian tidak boleh disangkal kecuali jika terdapat keterangan akan pengetahuannya bahawa ada fraud atau salah nyataan ataupun di mana pendaftaran gadaian-gadaian itu diperolehi oleh pemalsuan ataupun di mana hakmilik atau kepentingan telah diperolehi secara menyalahi undang-undang. Atas fakta-fakta, jelas tiada keterangan sebegitu. Kepentingan pemegang gadaian, kerana tidak boleh disangkal, adalah dilindungi oleh proviso di bawah s. 340(3) KTN, dan walaupun hakmilik perayu boleh disangkal di bawah s. 340(1) KTN pendaftarannya tidak boleh disangkal dan tidak lagi ditaksahkan hingga kini. Perayu, walaupun didaftarkan sebagai tuan punya tanah itu, tidak sebenarnya memiliki tanah itu. Walau bagaimanapun, kepentingan dalam tanah itu telah kemudiannya diberi kepada responden ketiga sebagai pemegang gadaian, yang merupakan *bona fide* dan yang telah memperolehi kepentingan secara suci hati dengan balasan. Menggunakan prinsip dalam *Adorna Properties Sdn Bhd v. Boonsom Booyanit*, responden ketiga mendapat kepentingan segera yang tidak boleh disangkal. Oleh

yang demikian, responden ketiga tidak memperolehi kepentingannya di bawah suatu suratcara yang tak sah. Sebenarnya, responden ketiga telah memperolehi kepentingannya, boleh dikatakan, sebagai sesuatu kepentingan yang kemudiannya telah diberi oleh perayu (sebagai tuan punya berdaftar) dan dengan hati suci dan untuk balasan berharga. Memandangkan apa yang dinyatakan di atas, rayuan ini seharusnya ditolak.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Booyanit [2001] 2 CLJ 133 FC ***(refd)***

OCBC Bank (M) Bhd & Ors & Another Appeal v. Lee Lee Fah [2000] 1 CLJ 71 CA ***(refd)***

Legislation referred to:

National Land Code, s. 340(1), (2), (3)(a), (b)

For the appellant - Kong Yit Har; M/s Siva, Ram & Kong
For the respondent - Ong Siew Wan (Mohd Zaki Mamat with him); M/s Lin & Assoc

[Appeal from High Court, Kuantan; Suit Nos: 22-6-1987 & 22-7-1987]

[Editor's note: For the High Court judgment, please see Tan Kim Tor lwn. Tan Sian San & Satu Kes Lain [2003] 8 CLJ 806.]

Reported by Suresh Nathan

JUDGMENT

Zainun Ali JCA:

[1] There were two suits filed, ie, No. 22-6-1987 and 22-7-1987 in the Kuantan High Court which were heard by YA Dato' Abu Samah bin Nordin. The learned judge gave decisions in both suits on 4 July 2003. In the suit 22-7-1987, the learned judge dismissed the appellant's claim against the respondent. This is the appeal before us.

[2] There was no appeal filed by plaintiff in suit No 22-6-1987. Thus the decision therein is not to be disturbed.

[3] It is to be noted that the plaintiff in 22-6-1987 is the father of the appellant in this appeal. Briefly, the facts of this case can be summarised thus:

The appellant (plaintiff) in his amended statement of claim dated 20 November 1987, asserted that he is the registered proprietor of a parcel of land known as P.T. No. 6371 in the Mukim of Kelantan in an approximate area of 9a Or. 00p held under H.S. (M) No. 6033 (hereinafter referred to as "the said land").

[4] It is also the appellant's claim that on 11 June 1984, the first respondent (first defendant) purporting to act under a Power of Attorney No. 80 of 1977 deposited in the Registry of the High Court Kuantan (hereinafter referred to as "the PA"), and executed two charges ie:

(a) a charge over the said land in favour of the third respondent to secure a loan of RM200,000 given by the third respondent to the second respondent;

(b) a charge over the said land in favour of the third respondent to secure a loan of RM100,000 given by the third respondent to the second respondent.

[5] The said charges were:

(a) Gadaian Perserahan No. 1671/84 Jilid 140 Folio: 6

(b) Gadaian Perserahan No. 1672/84 Jilid 140 Folio: 7

and both were registered on 16 June 1984.

[6] It is the appellant's case that the said PA was not executed by him. The signature therein was not his and thus the signature purporting to be that of the appellant's is a forgery.

[7] The appellant asserted that he first became aware of the fraud when he received a notice of demand dated 9 March 1985 from the solicitors for the third respondent Messrs H.Y. Lee & Hee of Kuantan, Pahang, demanding for payments of RM111,825.85 for an overdraft account and RM997,244 for a loan account on the ground that the appellant had failed to make the payments.

[8] Thus by reason of the forgery and fraud on the first respondent's part, the appellant suffers loss and damage.

[9] The appellant's alternative claim is, since there is an endorsement on the title to the said land which reads as follows:

> Tanah yang diberi milik ini tidak dibenarkan dipajak, dicagar, dijual milik, diwakilkuasakan atau dihapuskan dengan kelulusan bertulis terlebih dahulu daripada YAB Menteri Besar Pahang.

then the said charges are void since prior written permission from the Menteri Besar Pahang was not obtained before their execution. And that even if the PA is valid (which appellant denies), the said charges are void for the abovesaid reasons.

[10] The appellant therefore sought:

(a) a declaration that the said charges as registered are *void ab initio*;

(b) an order cancelling or expunging from the register the issue documents of title to the parcel of land known as P.T. No. 6371 in the Mukim of Kuala Kuantan held under H.S. (M) No. 6033 and the memorial of the said charges;

(c) an order directing the third respondent to deliver up to the appellant the issue documents of title to the parcel of land known as P.T. No 6371 in the Mukim of Kuala Kuantan held under H.S.(M) No. 6033;

(d) a declaration that the Power of Attorney No. 80 of 1977 deposited in the Registry of the High Court at Kuantan, purportedly executed by the appellant in favour of the first respondent is *void ab inito* and an order cancelling or revoking the same.

[11] The appellant also asked for damages, costs, interest, and further or other reliefs.

[12] In the court below, there was no dispute that the appellant is indeed the registered owner of the said land. There was also no dispute that the land was charged to the third respondent as security for banking facilities granted to the second respondent.

[13] From the record before us, what could be discerned is this: The appellant's father, SP1 (Tan Kim Tor), gave an explanation as to how the first defendant came into their lives. He said that he knew the first defendant in 1973 when he wanted to learn to drive, as the first defendant was a driving instructor. SP1 said that he had given a photo copy of his identity card to the first defendant to be submitted to Jabatan Pengangkutan Jalan.

[14] SP1's most telling evidence is this. In unequivocal terms he testified that he did not at any time applied for the land as indicated in the Power of Attorney. He said thus:

> Tanah No. HS(M) 6373 PT No 6378 dalam P.A ini bukan tanah kepunyaan saya. Saya tidak pernah pada bila-bila masa memohon tanah yang seperti yang tercatat dalam surat wakil kuasa. (Page 44 A.R.)

[15] He went on to say:

> … Saya tidak pada bila-bila masa mencagar tanah tersebut kepada defendan 3. (Page 44 A.R.)

[16] Clearly SP1 had not only not applied for the land, he had also not charged the land to the third defendant. SP1 further testified that he only knew of the charge (to third defendant) when he received the letter of demand from third respondent's solicitors Messrs H.Y.Lee. He lodged a police report and forwarded this letter of demand to Messrs Siva, Ram & Co.

[17] As regards the appellant's evidence, he affirmed much of what was said by his father, SP1 that he is not the owner of the land; that he had never given authority to the third respondent to charge the land and that he only knew about the said land after having been told of it by his father when the latter received the letter of demand from the said solicitor.

[18] Interestingly the appellant's witness ie, SP3, testified that he could not find or locate in his record any application by the appellant, with regard to the land. Likewise, he could not find or locate any charge made on the land. He further testified that there was nothing in his record which confirmed that the appellant's father, SP1, had received the letter dated 17 July 1987 which was sent by the land office.

[19] The respondent's lone witness was a credit executive of the third respondent. He testified that from the third respondent's record, the registered owner is the appellant's father, SP1. He said that the land was charged by both SP1 and appellant to the third respondent and registered with the land office on 16 June 1984. He said it was the land office which gave consent to charge the land.

[20] He testified that the third respondent had only a photocopy of the PA which indicated that the PA was given to the first respondent. SP1 went on to testify that although there was a restriction on the title, there was no evidence of any application to lift the restriction.

[21] Almost, a year later ie, on 23 June 1986, appellant's father SP1 lodged a police report where he again reiterated that he is not the owner of the land and went on to say that he suspects that a third party is using his name.

[22] After hearing both parties, the learned trial judge made these findings, that:

(a) the registration of the appellant in the issued documents of title was obtained by fraud or forgery;

(b) the appellant had never charged the said lands to the third respondent;

(c) that the appellant had never granted a Power of Attorney to the first respondent;

(d) that the appellant had never given authority to the first respondent to charge the land to the third respondent.

[23] He went on to say that in view of the above, s. 340(2) National Land Code applies, which renders the appellant's title defeasible.

[24] The trial judge went on to say that the appellant does not come within the category of persons entitled under the National Land Code s. 340(3)(a) and (b) to seek an order to nullify the charges.

[25] The learned trial judge was also of the view that to conclude that the charges are void would prejudice the third respondent's rights as holders of the charges.

Court Of Appeal

[26] Before us, at the outset, counsel for the third respondent proposed that should the appellant withdraw his appeal, the third respondent will not proceed with any shortfall upon the sale of the land, and that each party bear their own costs.

[27] Counsel for the appellant needed time to take instructions from her client and the matter was stood down for ten minutes. When court resumed its sitting, counsel informed the court that the appellant wished to carry on with the appeal.

Both parties were heard.

The Court's Finding

[28] In this appeal, the appellant's primary purpose is to invalidate the charges, pursuant to the respondent's demand for the repayments of the overdraft and loan facilities which had not been settled by the second respondent.

[29] Whilst the decision of the learned trial judge on the issue of ownership to the land is contentious in view of judicial pronouncements such as *Adorna Properties Sdn. Bhd. v. Boonsom Booyanit* [2001] 2 CLJ 133, regard must be had to the evidence in the High Court and found in the judgment at p. 69 appeal record, which was not challenged on appeal.

[30] The counsel for the appellant himself had submitted in the High Court that if para (c) of the relief sought for is not granted, the appellant applies that their names be deleted from the register and the issue of document of title to be returned to the land office.

[31] We find that the above position taken by the appellant is not only consistent with the appellant's testimony that the said land is not his land, it also clearly manifests the fact that the appellant knew that the said land could and should not belong to him.

[32] The learned trial judge went further to state that in view of the above, it was untenable that the appellant should seek the said reliefs in his application. We agree, as the declaratory reliefs sought for by the appellant are equitable reliefs requiring the appellant to come to court with clean hands.

[33] We find that the third respondent's title in the charge is indefeasible. The third respondent was an innocent party and thus its interest as chargee is indefeasible unless there is evidence to the third respondent's knowledge that there is fraud or misrepresentation or where the registration of the charge was obtained by forgery or where the title or interest was unlawfully acquired.

[34] Clearly on the facts, there was no such evidence. (See *OCBC Bank (M) Bhd & Ors & Another Appeal v. Lee Lee Fah* [2000] 1 CLJ 71).

[35] The interest of the chargee being indefeasible is protected by the proviso under s. 340(3) NLC. What can be said is that although the title of the appellant be defeasible under s. 340(1) its registration was not and has not been invalidated till to date.

[36] The position seems to be this. That the appellant though registered as land owner did not actually own the land. On the facts this position can be distinguished from those in *Adorna Properties*. However the interest of the said land was subsequently granted to the third respondent as chargee who is *bona fide* and who acquired the interest in good faith with consideration.

[37] Applying the principle in *Adorna Properties* the third respondent obtained immediate indefeasibility of its interests.

[38] Thus the third respondent did not acquire its interest under an instrument that was void. In fact the third respondent had acquired its interest to all intents and purposes, as an interest subsequently granted from the appellant (being registered owner) in good faith and for valuable consideration.

[39] In view of the above, we unanimously dismiss this appeal with costs. Order of the High Court is affirmed. The deposit to respondent to account for taxed costs.